

October 10, 2003

Via tree.trimming@bpu.state.nj.us

Mr. Ken Warren
Board of Public Utilities
Division of Energy
Two Gateway Center
Newark, New Jersey 07102

Re: New Jersey Board of Public Utilities'
Straw Proposal for Regulations on Vegetation
Management (Tree Trimming) Standards

Dear Mr. Warren:

Please accept this letter containing the comments of Public Service Electric and Gas Company ("PSE&G") to the New Jersey Board of Public Utilities' (the "Board") straw proposal for regulations on vegetation management (tree trimming) standards.¹

Background

The Board published on its website a request for public comment to its straw regarding vegetation management standards. This initiative is considered to be part of the Board's ongoing effort to establish effective reliability standards for New Jersey electric public utilities pursuant to the Electric Discount and Competition Act of 1999 ("EDECA"), *N.J.S.A. 48:3-49 et seq.* Based on a review of the draft proposal, PSE&G has significant concerns as detailed below.

Threshold Issue

Contractors trim approximately 250,000 trees annually on behalf of PSE&G. During the period 1999-2002, PSE&G received an average of 41 Board and Executive Inquiries regarding vegetation maintenance activities. During the first nine months of 2003, PSE&G has received only 25 such customer complaints, or 0.016 percent complaints received per the number of trees trimmed to date. Nonetheless several provisions of the proposed rules would impose costly and administratively burdensome requirements on PSE&G. This seems unwarranted. Accordingly, PSE&G proposes amendments to the straw that would minimize the risk, burden and cost to the New Jersey electric public utilities.

¹ PSE&G is submitting these comments to a pre-publication, draft rule proposal. PSE&G reserves the right to raise additional issues and concerns once the Board publishes the proposed regulations for formal comment.

Comments on Specific Provisions of the Straw Proposal

Proposed N.J.A.C. 14:5-8.2 Definitions

PSE&G suggests that the definition for “Contractor” is incomplete and, as proposed, may not adequately capture all relevant contractor entities. Accordingly, PSE&G proposes including terms such as “corporation,” “partnership” or “limited liability entity” to this definition.

Recommended Change:

“Contractor” means a business entity (including but not limited to corporation, partnership or limited liability entity) or² person with which a utility contracts to perform work and/or to furnish information and/or material, and shall include all subcontractors engaged by a contractor to perform any of the obligations required by a contract.

PSE&G seeks clarification of the term “cultural” as it is used to refer to a method of controlling vegetation in the definition of “Vegetation Management.”

Current Proposal:

*Vegetation management options include biological, chemical, **cultural**, manual and mechanical methods of controlling vegetation in order to prevent hazards caused by the encroachment of vegetation on facilities, and to provide utility access to the facilities.*

Proposed N.J.A.C. 14:5-8.3(b)

PSE&G does not object to a requirement that electric public utilities and/or its contractors obtain all requisite permits and licenses prior to commencing work. PSE&G suggests, however, that the Board add the following sentence to this provision to allow for emergency situations where time is of the essence.

Recommended Change:

In the event of an emergency, this requirement is waived.

Proposed N.J.A.C. 14:5-8.3(c) General Provisions

² Under “Recommended Change,” an underline indicates new language and a strikeout indicates deletion of language currently contained in the rule proposal.

PSE&G opposes the Board's proposal to impose fines of up to \$100 per day on an electric public utility for violation of this subchapter without providing any opportunity to cure. PSE&G recommends that the Board include notice to the electric public utility of a violation and permit the electric public utility ten business days to correct the situation before time begins to run. Also, PSE&G seeks clarification on whether "starting upon the date of the violation" refers to the date on which the work is performed or the date on which the utility is notified of the violation.

Current Proposal:

An electric public utility that violates this subchapter shall be subject to fines of up to \$100 per day per violation, starting upon the date of the violation.

Recommended Change:

The Board shall notify the electric public utility in writing of a violation of this subchapter. Upon receipt of such written notice, the electric public utility shall have ten (10) business days to correct such violation. Any failure to correct the violation within ten (10) business days may subject the public utility to fines of up to \$100 per day per violation, starting on the eleventh business day after such notice is received.

Proposed N.J.A.C. 14:5-8.4(b) Maintenance Cycle

PSE&G proposes that the Board permit the electric public utility a reasonable timeframe in which to perform maintenance repairs. Applying a reasonableness standard permits the electric public utility the ability to both assess the maintenance work to be performed and to prioritize the work in order of criticality. Accordingly, PSE&G proposes the following language.

Recommended Change:

If potential problems are found during the inspections under (a) above, the electric public utility shall take all reasonable steps to ensure that maintenance is performed as required under 14:5-8.5.

Proposed N.J.A.C. 14:5-8.5(b) Technical Standards for Vegetation Management

PSE&G objects to the Board's proposal requiring electric public utilities to "employ a vegetation manager (VM)." A Board requirement directing an electric public utility to employ a Vegetation Manager would be contrary to the Board's previously stated policy which provides that the Board does not "as a general rule [] intrude itself into matters which have been usually considered management's prerogative." *Re Jersey Central Power & Light Co.*, 38 P.U.R.^{4th} 115 (N.J.B.P.U. 1980). Clearly, a rule that specifically directs an electric public utility to hire an employee with specified

credentials, and explicitly prohibits the utility from using a contractor with similar credentials, is beyond the Board's stated legislative authority as set forth in *N.J.S.A. 48:2-13*. Similarly, the manner in which the electric public utility satisfies its vegetation management obligations is outside the Board's purview as long as those obligations are satisfactorily met. Such a rule infringes upon a utility's inherent authority to manage its own business using its own judgment to act in the best interest of its shareholders and customers.

Finally, the Board's record contains no rationale justifying the adoption of a standard that explicitly mandates the qualifications of a particular utility employee or prohibits the retention of a contractor to fulfill that role. Accordingly, PSE&G proposes the following changes.

Current Proposal:

Each electric public utility shall employ a vegetation manager (VM). The VM shall be utility employee, not a contractor, who is responsible for all aspects of the utility's vegetation management program, and for ensuring compliance with this subchapter.

Proposed Change:

Delete *N.J.A.C. 14:5-8.5(b)* and add in its place the following language: An electric utility's vegetation management program shall be managed by an employee(s) or agent(s) of the electric utility who possess(es) knowledge of and experience in electric line clearance and Electric Utility Arboriculture methods and safety procedures.

Proposed *N.J.A.C. 14:5-8.5(d)*.

PSE&G recommends deleting Item No. 5, entitled "Pruning Standards for Shade Trees." These standards are local standards that basically mirror the regulations contained in Item No. 3. Also, these standards predominately apply to aesthetic pruning guidelines, rather than the Electric Utility Arboriculture method proposed in *N.J.A.C. 14:5-8.2*.

Proven national specifications continue to be used in a satisfactory manner throughout the country. Uniformity across regions is key, particularly for utilities and contractors that transverse state lines. Additionally, the use of uniform, national standards prevents the possibility that standards will be updated, without proper notice and comment, in a manner that would hamper utility vegetation management operations. At a minimum, the Board should ensure proper notice and comment in order to provide electric utilities an opportunity to review any changes made to the standards adopted by the Board in its final rule.

Recommended Change:

In performing vegetation management, each electric public utility shall ensure compliance with all of the following:

- 1. Pruning Trees Near Electric Utility Lines, by Dr. Alex L. Shigo;*
- 2. ANSI A300, as defined at N.J.A.C. 14:5-8.2;*
- 3. Tree Pruning Guidelines, published by the International Society of Arboriculture;*
- 4. Environmental Stewardship Strategy for Electric Utility Rights-of-Way, published by the Edison Electric Institute Vegetation Management Task Force; and*
- 5. ~~Pruning Standards for Shade Trees, published by the New Jersey Board of Tree Experts;~~*
- 6. Regulations governing Electric Power Generation, Transmission, and Distribution, promulgated by the United States Occupational Safety and Health Administration at 29 CFR Part 1910.269;*
- 7. ANSI Z133.1, as defined at N.J.A.C. 14:5-8.2; and*
- 8. All applicable requirements of the "New Jersey High Voltage Proximity Act", N.J.S.A. 34:6-47.1 et seq. and implementing rules at N.J.A.C. 12:186.*

Proposed N.J.A.C. 14:5-8.5(f)

The contracts for vegetation management work entered into between PSE&G and its contractors contain a requirement that the contractor inform its employees of all applicable federal, state, county and municipal rules and regulations. PSE&G seeks clarification as to whether a provision in its contract for vegetation management work with the contractor, which requires that the contractor comply with all applicable federal, state, county and municipal rules and regulations, satisfies the Board's concerns. In the event that the Board does not agree that such contract provision adequately addresses the Board's concerns, PSE&G opposes such provision. The rule as proposed appears to require PSE&G to directly supervise the contractor's employer-employee relationship. PSE&G has traditionally hired competent, experienced contractors to perform such work. Additionally, the rule, as proposed, appears to require PSE&G to directly supervise the contractor and its employees. This would implicate the doctrine of "co-employment," which is discussed more fully below at N.J.A.C. 14:5-8.6(a). In order to avoid this potential consequence, PSE&G proposes the following changes to the rule proposal.

Recommended Change:

The electric public utility shall ensure that all contractors ~~inform their employees of~~ comply with all applicable Federal, State, County and Municipal rules and regulations that apply to the contractors' work, ~~and shall ensure that the contractor complies with each applicable requirement.~~

Proposed N.J.A.C. 14:5-8.6(a) Training

PSE&G opposes the requirement that the electric public utility provide “training and on-the-job experience” to contractors hired to perform vegetation maintenance. Instead, PSE&G supports a requirement that if an electric public utility hires contractors to perform its vegetation management program, the contractor must possess knowledge of and experience in electric line clearance and Electric Utility Arboriculture methods and safety procedures. Generally, PSE&G hires a contractor for the expertise and skill the contractor possesses in a specific area. PSE&G makes such contractor aware of the Board’s statutes and regulations; and PSE&G continually checks and monitors the contractor’s work to ensure that the work complies with the Board’s requirements. However, a rule that directs an electric public utility, rather than the contractor/employer, to specifically train the contractor’s personnel, exposes the electric public utility to the risk of co-employment or joint employer liability,³ a risk to which the electric public utility would not otherwise be vulnerable. PSE&G proposes that, rather than requiring the utility to train the contractor and its employees, the Board set the standards and allow the electric public utility to ensure compliance with those standards. The Board should not define the electric public utility’s contractual or employment relationships. Accordingly, PSE&G proposes the following changes to the current rule proposal.

Recommended Change:

Each electric public utility shall provide training and on-the-job experience to ensure that all ~~personnel~~ employees that perform vegetation maintenance, ~~whether employees or contractors,~~ are trained in proper Electric Utility Arboriculture and safety practices, are knowledgeable regarding techniques in line clearance, and have demonstrated the ability to perform the safety requirements and special techniques involved. If the electric public utility hires a contractor to perform vegetation maintenance, the contractor must be trained in proper Electric Utility Arboriculture and safety practices, be knowledgeable regarding techniques in line clearance and be able to demonstrate the ability to perform the safety requirements and special techniques involved. ~~This qualified person may or may not be currently employed by a line clearance contractor.~~

³ The potential risk could give rise to tax implications, coverage under various statutes such as the Workers’ Compensation Act, the Law Against Discrimination, and the Unemployment Compensation Law, as well as liability for torts under the doctrine of *respondeat superior*.

Proposed N.J.A.C. 14:5-8.6(b)

PSE&G seeks clarification whether this provision requires the electric public utility to maintain records of the contractor's employees, including training records. Again this raises potential co-employment or joint employment issues. Additionally, it would be administratively impossible to maintain such records for employees with whom the electric public utility does not have a direct relationship. Accordingly, PSE&G proposes the following changes.

Recommended Change:

Each utility shall keep records of ~~all its personnel~~ employees that perform vegetation management, and the dates and types of training that each has received.

Proposed N.J.A.C. 14:5-8.6(d).

The proposed rule does not provide an exemption from the training requirements for utility employees, such as troubleshooters and line personnel, who, in an emergency, must remove limbs from trees in order to restore electric service or ensure the public's safety. PSE&G believes that this concern is best addressed by adding a new section (d) which provides that employees working under emergency conditions are not performing vegetation maintenance.

Recommended proposal:

In the event of an emergency, the removal of limbs from trees by an electric public utility's employee(s) does not qualify as the performance of vegetation maintenance for purposes of these regulations.

Proposed N.J.A.C. 14:5-8.7 (a) Public Notice of Planned Tree Trimming

The proposed rule does not comport with the requirements of N.J.S.A. 48:3-17.9, which provides that a public utility may not enter a utility easement or right-of-way to perform vegetation maintenance without having first provided at least five days' notice to the landowner, either personally or *via* certified or registered mail. The statute exempts such notification requirements under certain specified conditions. This same exemption should be included in the proposed rule. Accordingly, PSE&G proposes the following changes.

Recommended Change:

The utility shall make a reasonable attempt to notify all ~~affected~~ tree and/or property owners affected by vegetation management, prior to performing vegetation management activities that will affect their property. This

requirement shall be satisfied if the utility provides written notice to affected tree and/or property owners at least ~~seven~~ five days prior to performing any planned vegetation management activities. Notice may be in any form reasonably calculated to provide actual notice, including but not limited to printed door hangers, mailings, and/or e-mail notice. Notice shall not be required (i) in the event of an emergency; (ii) where notice is waived by the landowner; (iii) where the easement or right of way provision expressly permits entry without notice or upon notice of a lesser period of time; (iv) where the landowner consents to entry; or (v) where the maintenance to be performed is located over, on, through or under any public street, road, highway or other public thoroughfare.

Proposed N.J.A.C. 14:5-8.7 (b)

PSE&G seeks clarification as to the acceptability of permitting the contractor to maintain the records in those instances where the contractor provides notice to the property owners regarding PSE&G's vegetation management activities.

Proposed N.J.A.C. 14:5-8.7(c)

PSE&G seeks to clarify whether the electric public utility's agent(s), as opposed to the electric public utility itself, may notify municipalities and public authorities regarding the electric public utility's vegetation management activities. Additionally, PSE&G does not support the proposed rule's fourteen days advanced notice requirement for all of the reasons discussed above. PSE&G suggests that the Board seek to remove the advanced notice requirement. Currently, PSE&G provides the municipalities and public authorities with advance notice of its vegetation maintenance activities. Once the municipalities and public authorities are notified, schedules are coordinated in order to accommodate any specific situation(s) or timing issues. PSE&G recommends that Board permit such practices to continue.

Recommended Changes:

An electric public utility, or its agent, shall notify municipalities and public authorities that may be affected by vegetation management activities. Such notice shall be in ~~writing, at least 14 days in~~ advance of the vegetation management activities. Such notice shall include the planned dates and locations of the vegetation management activities.

Proposed N.J.A.C. 14:5-8.8(b) Outreach Programs

PSE&G seeks clarification on whether a posting on the electric public utility's website satisfies the Board's requirement to conduct a public education program.

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Conclusion

PSE&G thanks Board Staff for the opportunity to comment on this straw proposal. PSE&G looks forward to working collaboratively with Board Staff to resolve the issues outlined in these preliminary comments.

Very truly yours,

Pauline Foley

cc: K. Warren
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